In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1225

LOUIS A. MARKERT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in ruling that he waived his privilege under the speech or debate clause of the Illinois State Constitution on the ground that there can be no waiver of that right; he contends further that if there could be a waiver, his waiver here was not knowingly and intelligently made.

1. In 1973 a grand jury was empaneled in the Northern District of Illinois to investigate alleged corruption in the Illinois General Assembly. Petitioner, a member of the Illinois General Assembly, consented to be interviewed by federal postal inspectors and an Assistant United States Attorney; he also testified before the grand jury. He waived his Fifth Amendment privilege against self-incrimination, and did not claim any privilege arising under the speech or debate clauses of either the federal or the Illinois constitutions (Pet. App. 12, 27).

In December 1974, petitioner and two others[1] were indicted in the United States District Court for the Northern District of Illinois for extortion in violation of the Hobbs Act, 18 U.S.C. 1951, and for mail fraud, in violation of 18 U.S.C. 1341, while members of the Illinois House of Representatives. The indictment charged them with extorting $1,500 from members of the Illinois Car and Truck Renting and Leasing Association, and with engaging in a scheme to defraud the citizens of the State of Illinois of their "loyal, faithful and honest services in their official positions," and "their right to have the legislative business of the State of Illinois conducted honestly," by accepting $1,500 to block the passage of certain legislation (Pet. App. 12).

In February 1975, petitioner moved to suppress his grand jury testimony and the statements given to the Assistant United States Attorney and the federal postal inspector. He claimed that these statements were obtained from him in violation of the speech or debate clauses of both the federal and state constitutions (U.S. Const., Art. I, Sec. 6, Cl. 1; Illinois Const., Art. IV, Sec. 12). The district court sustained the motion, ruling that petitioner was entitled to the protection of the Illinois speech or debate clause.[2] The district court ordered petitioner's statements and grand jury testimony suppressed, and held that a state legislator could not waive the privilege accorded by the speech and debate clause of the state constitution (Pet. App. 1-10).

The United States appealed the suppression order pursuant to 18 U.S.C. 3731. A panel of the court of appeals,

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[1]Robert Craig and Thomas J. Hanahan, who were also members of the Illinois legislature.

[2]"A member of the [General Assembly] shall not be held to answer before any other tribunal for any speech or debate, written or oral, in either house."

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one judge concurring separately, reversed. The majority opinion concluded that statements of state legislators are privileged from disclosure or inquiry in federal criminal proceedings as a matter of the federal common law of evidence (Pet. App. 13-24), but it went on to hold that petitioner had waived this protection by voluntarily testifying and giving statements (*id.* at 24-27). Judge Tone concurring, was of the view that only the doctrine of official immunity protects state legislators from liability, that this immunity does not bar federal criminal prosecutions, and that where there is no common-law official immunity, there can be no evidentiary official privilege (Pet. App. 27-33).

Petitioner's application for rehearing was denied by the panel on January 27, 1976. However, the government's petition for rehearing and suggestion for rehearing *en banc* was granted April 26, 1976. We are advised that reargument before the *en banc* court will likely be held in mid-June.

2. As a result of the action of the court of appeals granting rehearing *en banc* in this case, it would be inappropriate at this time for this Court to issue a writ of certiorari to review the judgment of the panel. While it seems likely from the course of events in the court of appeals that petitioner's contentions regarding the waiver of his legislative privilege would not be accepted by the *en banc* court (the government's petition having sought reconsideration only of the portion of the panel's decision recognizing the existence of a privilege for state legislators in federal proceedings), the entire case is before the court of appeals, and is at least theoretically possible that the panel's judgment would be altered in petitioner's favor. Thus, the effect of the pending reconsideration of this case by the court of appeals is to render the instant petition one requesting what amounts to certiorari before judgment in the court

of appeals. No occasion exists to justify that extraordinary course in the present context.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1976.

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